SUPREME COURT, U.S.
FILED

No. 03-722 OCT 9 2003

In the
# Supreme Court of the United States

In Re: The Trusts under the Will of Albert Pollak

PATRICIA POLLAK WEISS,

*Petitioner,*

v.

PHYLLIS POLLAK BERKETT, As the Successor Interim Trustee of the Trusts Under the Will of Albert Pollak, Deceased, and the Albert Pollak Inter Vivos Trusts,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

# PETITION FOR A WRIT OF CERTIORARI

PATRICIA POLLAK WEISS
*Attorney for Petitioner*
Post Office Box 751
Sag Harbor Shopping Cove Suite #12
Sag Harbor, New York 11963
(631) 725-4486

## QUESTIONS PRESENTED

From 1976 to 2003, Florida law expressly provided that a former testamentary trustee is not subject to suit by a trust beneficiary unless such a lawsuit is commenced within 6 months of the trustee's delivery of an accounting or "other statement fully disclosing the matter". Fla. Stat. § 737.307. For decades, court-appointed non-resident trustees, such as Petitioner, have relied upon that promulgated 6 month statute of limitations when concluding their trusteeships and delivering all trust legal and accounting records to their successor trustees and beneficiaries. In June 2001, a Florida appellate panel held that Petitioner had delivered all trust legal and accounting records to Respondent's chosen legal representative in early January 1990. Yet, in February 2003 a Florida court, through an order by a probate judge who was later disqualified for bias, nonetheless ignored the promulgated 6 month statute of limitations and entered a "surcharge judgment" for $1,693,181.73 against Petitioner in consolidated cases that were not commenced until 1991 and 1992. That "surcharge judgment" surcharged Petitioner in an amount equal to (at least) *all* checks written by the sole court-appointed *prior* institutional fiduciary and also for all checks written by Petitioner for *all* trust expenses (e.g., over ***$300,000.00*** in ***federal taxes*** paid to the IRS; and also legal, accounting, and trustees fees, etc.) for 5 years. The judgment was affirmed, deleting only the prior trustee's *trustees fees* during 1984.

The first question presented is whether the Due Process Clause, Amend. XIV, forbids a *sua sponte* judicial revival and extension of an expired civil limitations period where the promulgated statute of limitations established a rule of law that was a complete affirmative defense which calculated the promulgated 6 month period from the actual date of the former non-resident trustee's actual delivery of records rather than from a beneficiary/successor trustee's claimed delayed discovery of the information contained in all the records constructively received.

The second question presented is whether the Due Process Clause, Amend. XIV, and Prohibition of Excessive Fines Clause, Amend. VIII, forbids the judicial imposition of an arbitrary and "grossly excessive" civil punishment called a "surcharge judgment", which punitively held Petitioner to be "surcharged" for all checks written over a 6 year period of time without any corresponding evidentiary finding that each such expenditure was ever unnecessary to accomplish a legitimate purpose on behalf of the trusts.

The third question is whether the state appellate court failed to articulate and apply the correct rule of law for appellate review of fundamental constitutional errors made in state civil cases inasmuch as Fla. Stat. § 59.041, the civil "harmless error rule", fails to take into account that constitutional errors involving a judicially revived civil statute of limitations and unconstitutional excessive punishments by a judge disqualified for bias can never be harmless errors, and so such fundamental constitutional errors require reversal after a *de novo* review unless the civil appellee proves beyond a reasonable doubt that there is "no rational possibility" that those constitutional errors might have contributed to an adverse bench verdict.

The fourth question is whether the Supreme Court of Florida should have accepted discretionary review to effectuate the purposes of the Due Process, Equal Protection and Privileges and Immunity Clauses, and the prohibition against Excessive Fines, in order to frame a constitutionally adequate "civil harmless error rule" to analyze the multiple constitutional violations in light of Florida's 6 month civil limitations period and case law precedent which has rejected the "delayed discovery doctrine" in the fiduciary context and espoused the principle that prior orders of a disqualified judge are to be subjected to special judicial scrutiny.

## LIST OF ALL PARTIES

The parties to the proceedings are:

Petitioner:
PATRICIA POLLAK WEISS

Respondent:
PHYLLIS POLLAK BERKETT

PATRICIA POLLAK WEISS is the daughter of PHYLLIS POLLAK BERKETT and Albert Pollak, Deceased.

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## OPINIONS BELOW

The Florida Third District Court of Appeal's interlocutory opinion and order establishing Petitioner's delivery date of all trust records and requiring no further accounting is reported at 785 So. 2d 1248 (Fla. 3d DCA 2001). (Appendix a-8 - a-9). The Order Granting Motion For Surcharge Against Patricia Pollak Weiss (per Korvick, J.) (a-1 - a-3) is unpublished. The Florida Third District Court of Appeal's opinion and order granting Petitioner's petition for a writ of prohibition disqualifying Judge Korvick is published at 827 So. 2d 383(Fla. 3d DCA 2002) (a-7). The Florida Third District Court of Appeal's subsequent opinion affirming what it calls the "surcharge judgment" with a small downward modification deleting only the *prior* trustee's trustee fees (a-4) is published at 835 So. 2d 283 (Fla. 3d DCA 2002). The appellate court's order denying rehearing and certification (a-10) is unpublished. *See* 2003 Fla. App. LEXIS 2504 (Fla.. Dist.Ct. App. 3d Dist. Jan. 31, 2003). The Florida Supreme Court orders denying a stay of enforcement ( a-6) and the motion for relinquishment of exclusive jurisdiction (a -6) are believed to be unpublished except for electronic publication on the website www.flcourts.org. The Florida Supreme Court's order denying discretionary review (a-5) is published at 851 So. 2d 730 (Fla. 2003).

## STATEMENT OF JURISDICTION

Florida's Third District Court of Appeal entered its opinion and order on November 6, 2002 and entered its order denying rehearing on January 31, 2003. Those orders were subject to discretionary review of the Supreme Court of Florida, which entered its order denying discretionary review on July 11, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). Sup.Ct.R.10 ( c) authorizes the petition because a state court decided important questions of federal law that have not been, but should be, settled by this Court, and/or decided federal questions in a way that conflicts with relevant decisions of this Court.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions of the United States Constitution are reprinted in the Appendix at a-11. These include the Due Process Clause, the Prohibition Against Excessive Fines Clause, the Privileges and Immunities Clause, and the Equal Protection Clause, which are included in the Fourteenth and Eighth Amendments.

The provisions of Fla. Stat. §737.307 ("Limitations on proceedings against trustee after beneficiary receives account"), Fla. Stat. §737.402 (2)(y) &(z) ("Powers of Trustees" to retain professionals) and Fla. Stat. §59.041 (Harmless error, effect") as are relevant to this petition are reprinted in the Appendix at a-11 – a-12.

Significantly, Fla. Stat. §737.307, as in effect until 2003, states: "Unless previously barred by adjudication, consent or limitations, an action against a trustee for breach of trust is barred for any beneficiary who has received a final, annual, or periodic account **or other statement fully disclosing the matter** unless a proceeding to assert the claim is commenced within 6 months after receipt of the final, annual, or periodic account or statement...."(boldface added).

## STATEMENT OF THE CASE

Petitioner PATRICIA POLLAK WEISS petitions for the United States Supreme Court to review the decision of the Florida Supreme Court which denied discretionary review of the order and opinion of the Florida Court of Appeal, Third District dated November 6, 2002. Petitioner requests that this Court also review the Florida Court of Appeal, Third District order and opinion and the underlying "Order Granting Motion For Surcharge Judgment Against Patricia Pollak Weiss." The Third District Court of Appeal had initiated its review of the case in **Weiss v. Berkett, 785 So. 2d 1248 (Fla. 3d DCA 2001)** ( a-8) when it reversed and remanded one of two counts. This petition concerns the "surcharge judgment" against Petitioner for $1,693,181.73.

**Procedural History**

On October 28, 1991, Respondent PHYLLIS POLLAK BERKETT ("BERKETT") filed a probate adversary proceeding against WEISS alleging two counts: 1) accounting and 2) surcharge. An essentially identical lawsuit was filed the following year. In June 1994, a probate judge ordered the 1992 suit be consolidated with the 1991 suit.

After a motion to dismiss was denied, Petitioner served and filed her answer, affirmative defenses and counterclaims. There were 26 affirmative defenses including, (#5) "26. All of BERKETT's demands and claims are barred by the various statutes of limitations" and (#7) "28. Judge Tanksley's April 1990 order waived and/or substantially curtailed all of the various rights which PHYLLIS POLLAK BERKETT has in connection with testamentary and intervivos trust accountings."

The following statement of the case and salient facts is taken from the interlocutory decision in this case (reversing the accounting claim after a trial/hearing on September 20-21, 2000), reported at Weiss v. Berkett, 785 So. 2d 1248, 1249-1250 (Fla. 3d DCA 2001): "After Berkett, the plaintiff below, filed suit for discharge of Weiss, the defendant below, as trustee of several testamentary trusts, Weiss and Berkett entered into a settlement agreement. Under this 1989 open-court settlement agreement, Berkett was to assume the trusteeship immediately. Weiss was to transfer all the trust records within her possession to Berkett within ten days and to send releases to any attorneys or accountants with trust records, putting them on notice that Weiss relinquished the right to access any documents. Weiss complied by transferring all the records to Berkett and sending the releases..... Berkett waived any right to an accounting in 1989. *See* Fla. Stat. 737.303(4)(d). The transcript of the 1989 settlement hearing, signed by both parties, shows that Berkett chose to take immediate possession of the documents rather than have Weiss prepare

an accounting..... In addition, because Weiss does not have possession of the records which she would need to perform an accounting, the lower court erroneously ordered Weiss to perform an impossible act..... the cause is remanded for further proceedings not inconsistent with this opinion."

On October 15, 2001, the lower tribunal held a third trial/hearing session to consider the amount for an award under the remaining "surcharge" count. On February 8, 2002, the lower tribunal (Korvick, J.) signed two orders, captioned as: "Order Granting Motion For Surcharge Against Patricia Pollak Weiss" and "Order Granting Motion For Plaintiff's Summary Judgment".

WEISS timely appealed based upon the lack of due process because of the trial judge awarding the grossly excessive surcharge judgment against Petitioner, despite the fact that there was no evidentiary basis therefor and because the relevant 6 month statute of limitations had expired prior to commencement of either case.

WEISS also sought to disqualify the trial judge based upon inappropriate remarks and conduct which WEISS believed demonstrated a prejudicial bias.

On October 25, 2002, the Third District's mandate issued in Weiss v. Berkett, 827 So. 2d 383 (Fla. 3d DCA 2002), which granted WEISS' petition for a writ of prohibition in this case concerning Judge Maria M. Korvick. The Third District essentially ruled that Judge Korvick should have immediately granted WEISS' legally sufficient motion for disqualification when it was made.

On November 6, 2002, the order granting the motion for a surcharge was construed on appeal as a "surcharge judgment" in the amount of $ 1,693,181.73. It was affirmed, except for deletion of trustees fees paid in 1984 to Coconut Grove Bank, so there was a small downward modification to "$ 1,676,377.73". On January 31, 2003, rehearing, rehearing *en banc* and certification were also denied . Thus, the facts and "law of the case" in Weiss v.

Berkett, 785 So. 2d 1249 were not disturbed.

On November 12, 2002, Judge Korvick, the Probate Administrative Judge, finally caused this case to be reassigned. By that time, however, the Third District's opinion and order had been entered.

Petitioner sought rehearing and expressly argued that eschewing the promulgated 6 month statute of limitations violated Petitioner's legitimate expectations of due process and that the Third District had not applied the correct rule of law for a review for the grossly excessive "surcharge judgment" because Florida's harmless error rule for civil cases, Fla. Stat. §59.041, insufficiently addressed Petitioner's constitutionally protected rights. Rehearing was denied.

Petitioner next sought review in Florida's Supreme Court. The Florida Supreme Court now has very limited jurisdiction insofar as remedying unconstitutional judgments. Petitioner argued that the Florida Third District's application of "the law" to the "record" is in direct and express conflict with the Florida Supreme Court's decisions which have (1) applied the Legislature's "intent" to promulgated statute of limitations, (2) rejected "the delayed discovery doctrine", and (3)determined lower tribunal orders "suspect" if the judge should have been immediately disqualified. Petitioner argued that other Florida district courts strictly apply Fla. Stat. 737.307's 6 month statute of limitations in the trustee's favor to avoid manifest injustice. *See* Fla. R. App. P. 9.030(a)(2)(A)(iv).

Petitioner also argued that it was self-evident on the face of the November 6, 2002 decision that the Third District held that although the lower tribunal adversary proceedings were commenced in 1991 and 1992, its liberal application of Fla. Stat. §59.041 ( the "reversible error" rule), resulted in a determination that a $1,676,377.73 "surcharge judgment" against a former testamentary trustee was not hampered by "the law" (including Fla. Stat. §737.307's 6 month statute of limitations), and "the record" (including Weiss v. Berkett,

785 So. 2d 1248 (Fla. 3d DCA 2001), which was also the "law of the case" establishing facts concerning WEISS' transfer of documents to BERKETT that triggered the commencement of the 6 month statute of limitations in January 1990.

Petitioner's Florida Supreme Court jurisdictional brief cited to *BMW v. Gore* and constitutional provisions throughout and it made the following arguments, *inter alia*:

1. The District Court's decision expressly and directly conflicts with the Florida Supreme Court's decision in Davis v. Monahan, 832 So. 2d 708 (Fla. 2002), which construed Fla. Stat. §737.307 as it pertains to trustees, and the legislative "intent" of Fla. Stat. §737.307's six month statute of limitations expressly precluded a "surcharge judgment" against Petitioner because its language forecloses any application of the "delayed discovery doctrine" once a trustee has transferred all trust documents fully disclosing matters to the beneficiary/successor trustee.

2. The District Court's decision to so liberally apply Fla. Stat. §59.041 in a manner that supersedes Fla. Stat. §737.307's six month statute of limitations expressly and directly conflicts with the decisions in the Fifth and Fourth Districts, Fraser v. Southeast First Bank, 417 So. 2d 707 (Fla. 5th DCA 1982) and Harris Trust Co. of Florida v. Davis, 668 So. 2d 689 (Fla. 4th DCA 1996) that held Fla. Stat. §737.307's six month statute of limitations must apply to prevent injustice to trustees.

3. The District Court's decision expressly and directly conflicts with the Court's decision in Fuster-Escalona v. Witsotsky, 781 So. 2d 1063 (Fla. 2000), by finding no "reversible error" under Fla. Stat. § 59.041's legal analysis when in fact a "miscarriage of justice" "logically" occurs if the presumption of correctness is applied to "any decision by a judge under a cloud of prejudice", and Fla. R.Jud.Admin. §2.160(h)'s right to reconsideration by motion made to the successor judge was unconstitutionally and

prejudicially truncated by the disqualified judge's failure to "immediately enter" her order of disqualification on a legally sufficient motion.

On July 11, 2003, the Florida Supreme Court denied discretionary review.

**The facts and the Florida law relevant to this petition**

Although there is recited language in the "surcharge judgment" that mentions a "conflict of interest", the trial court, and the appellate courts, failed to identify any specific conflict of interest that Petitioner had other than the ordinary conflict that any trustee has insofar as the trustee is entitled to trustees fees for administrative services rendered. Florida trustees are *required* to prepare Florida counsel to represent the trust and the trustee in court proceedings. There was no finding that any purported "conflict of interest" causally resulted in any greater expenditure of monies for administrative expenses paid to accountants or attorneys nor that Petitioner received a personal benefit from payments to third parties performing professional services, such as the law firm of Holland & Knight. Federal taxes must be paid.

Just as the trial judge had been confused about the statutes to apply in connection with the accounting claim (which adverse judgment was reversed in an interlocutory appeal), the trial judge also seemingly confused the statutes governing personal representatives of decedents' estates that have not yet been closed, with the statutes governing testamentary trusts established upon closure of the decedent's estate. Judicial pre-approval is required only in connection with expenses for the personal representative (i.e., executrix) and her attorney, *see* Fla. Stat. §733.617 and 733.6171(7) and *Bitterman v. Bitterman*, 714 So. 2d 356 (Fla. 1998). The statutes governing testamentary trusts in 1984-1989 did not require judicial pre-approval for payment to attorneys and accountants and actually authorized such payments. *See* Fla. Stat. §737.402(2)(y) and (z).

In Davis v. Monahan, the Florida Supreme Court expressly rejected any extension of the narrow circumstances in Heardon v. Graham, 767 So. 2d 1179 (Fla. 2000) which applied the "delayed discovery doctrine" in a case that concerned repressed memories of a childhood sexual abuse. Davis concerned a delayed breach of fiduciary duty claim for which the Florida Court rejected the "delayed discovery doctrine", finding that the limitations period was not 'tolled' until the discovery of the alleged violations.

In Davis, the Florida Supreme Court mentioned Fla. Stat. §737.307 for the purpose of comparison with another statute of limitations, to demonstrate that 737.307's "discovery" component would apply, but only until the fiduciary has provided the documents and then there is a 6 month statute of limitations in effect. It acknowledged that "the Florida Legislature created a statute codifying the limitations period for claims against a trustee, which is triggered after the beneficiary receives an accounting." The same statute appertains to the trust "**statements**" fully disclosing the matter. **The triggering language refers to a trustee's act of disclosing (by delivery and receipt) rather than a beneficiary's act of discovering.**

The Legislature's clear intent in enacting Fla. Stat. §737.307, as promulgated, is to provide former trustees with immunity from suit after 6 months where the trustee provided the beneficiary with a "final, annual, or periodic accounting or **other statement** fully disclosing the matter unless a proceeding to assert the claim is commenced within 6 months after receipt." Trust legal records and releases are statements of full disclosure. Accounting statements and paid invoices are statements fully disclosing those matters.

The Third District's interlocutory order placed BERKETT's receipt of all trust documents to be no later than when "transferred" in January 1990. Therefore, the statute of limitations expired in July 1990. Because the "delayed discovery doctrine" does not appertain where the legislature

has not provided a "discovery period" beyond six months after such full disclosure by delivery, and where an earlier decision found that WEISS fully cooperated with the transfer pursuant to the 1989 open-court settlement agreement that was ratified in April 1990, and because neither the surcharge "order" nor the decision provided for any equitable tolling (because WEISS' words did not cause BERKETT's late filing), Fla. Stat. §737.307 forbids any "surcharge judgment" that emanates from 1991/1992 lawsuits.

The Third District found that even in the absence of a discovery rule, and far more than 6 months after delivery and constructive disclosure of all trust documents, a "surcharge judgment" was not a "reversible error." Thus, the decision is in direct and express conflict with the decision in Davis v. Monahan, which found that the "delayed discovery doctrine" should not expand a promulgated statute of limitations.

The Third District's decision also conflicts with the interpretations and holdings in Harris Trust Co. of Florida v. Davis, 668 So. 2d 689 (Fla. 4th DCA 1996) and Fraser v. Southeast First Bank, 417 So. 707, 708-709 (Fla. 5th DCA 1982) which were identified as controlling authority under which Florida courts must strictly impose the 6 month statute of limitations because the former trustee, Petitioner WEISS, provided an accounting or other statement fully disclosing the matter to BERKETT.

In Fraser v. Southeast First Bank, etc., 417 So. 2d 707 (Fla. 5th DCA 1982),the court affirmed rejection of another belatedly filed claim against the trustee and explained how and why Fla. Stat.§737.307 went into effect on January 1, 1976. The Fraser court also determined that the trust area had suffered from a mischief and evil similar to that found in the probate area - that is, trustees, like executors, remained, theoretically, forever liable and, as a result, no competent person wished to undertake such an office. Therefore, the Fraser court noted, the State Legislature's 1975 promulgation of the 6 month statute of limitations was designed to

address those concerns and put finality on the claims against a trustee.

In Harris Trust Co. of Florida, the Fourth District also found the claim tardy. Yet, Petitioner was treated differently.

In ignoring the statute of limitations which was specifically legislated to afforded WEISS "surcharge" immunity after 6 months under Fla. Stat. § 737.307, the Florida Courts used an incorrect standard of review. The claimed prejudicial errors were based upon constitutional grounds and were therefore entitled to greater scrutiny than the "liberal construction" of a vague "miscarriage of justice" standard, which can be so liberally construed as to extend to an "end justifies the means" scenario without constitutional safeguards. Wendt v. Horowitz, 822 So. 2d 1252 (Fla. 2002) and Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co., 752 So. 2d 582 (Fla. 2000) reaffirmed that Florida courts must always examine whether a civil court defendant is afforded "fair play and substantial justice" in a constitutional sense so as to satisfy the Due Process Clause. It is required under the Fifth and Fourteenth Amendments, where a non-resident is "haled into" a Florida court for an Excessive Fine under the Eighth Amendment that also offends BMW v. Gore, 517 U.S. 599 (1996) under the Fifth and Fourteenth.

In Fuster-Escalona v. Witsotsky, the Florida Supreme Court wrote that "... an allegation of judicial prejudice is always a serious matter" Id. at 1065. "Furthermore, the neutrality of judges is a 'grave concern' even as to perception... The truth-seeking function of a court proceeding is undermined when there remains an open question as to a judge harboring a prejudice against a litigant.... Logically, any decision by a judge under a cloud of prejudice would be suspect, thus undermining the integrity of the court proceeding." That is why a judge must immediately enter an order of disqualification on a legally sufficient motion rather than delaying. Delay undercuts the intent of Fla. Stat. 38.10 and related rules. Fla.R.Jud.Admin. 2.160(h) states that prior

factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by the successor judge based upon a motion for reconsideration (made to the successor judge).

BERKETT admitted that she received accountings for 1984, 1985, 1986, 1987 and 1988. [Trial Transcript 9/21/00 @ 30] The 6/6/01 decision found that WEISS provided "all" of the trust records in early January 1990. WEISS' pleading and proof showed BERKETT's claim was time barred.

No checks were introduced as evidence when BERKETT's "expert witness", Mr. Ralph Maya, C.P.A. presented his "expert" "opinion", nor did Mr. Maya say that he ever reviewed actual checks when preparing his summary. Mr. Maya also testified on direct that he determined "how much in addition was paid by Phyllis Berkett individually because of there were no funds in the trust to pay these other fees." [T.T. 10/15/01@17]. ( BERKETT's counsel Mr. Hirschhorn had previously explained Mrs. BERKETT "didn't sue" for reimbursement for money she paid "out of her pocket." [T.T.9/21/00@177].

Respondent had also previously waived her claims. Her lawyer said "Mrs. Weiss, we're not here on breach of trust. We're here on a surcharge action against you." [T.T. 9/20/00@167]. The December 1989 transcript signed by BERKETT shows, pp. 53-54, her lawyer Mr. Hirschhorn stated on the record "We agreed not to surcharge the trustee."

On cross-examination, Mr. Maya admitted that he "never reviewed invoices for any of these expenses," [T.T.10/15/01@33] except for those of his own firm. He said he never spoke to WEISS' accountants Michael Singer CPA or Judith Penney, CPA and had no idea why money was paid to certain law firms [T.T. 10/15/01@34]. When asked if he saw "any nexus to an initiation of litigation or expenses of litigation" to the expenses, Mr. Maya said he "was asked to testify as to the totals of expenses per the accounting records,

m'am. That's all I did," adding that he was "not aware of any difference between one litigation and another," and had never reviewed any legal documents or pleadings. [T.10/15/01@34-35]. However, on his direct testimony, Mr. Maya was not so candid. He provided a total of $1,693,181.73 [A.10/15/01@29] when asked for the total for the "surcharge" against WEISS.

## REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, as a practical matter, because death is inevitable for all Americans, there is a strong public interest in ensuring that state courts which administer the decedent's testamentary trusts will do so within the framework of the Bill of Rights. The reasonable expectations of decedents and testamentary trustees include predictability of estate planning measures and assurances that there will be implementation of the rule of law in connection with fiduciary decisions and agreements made. This is particularly true in a nation where family members are dispersed throughout the country's 50 states because people live longer and often move from state to state. There is nationwide harm when a state court-appointed testamentary trustee cannot rely upon the notice in a state's codified law because that state's court system may instead implement perceived extraordinary equitable powers in areas where the codified law has been expressly portrayed as preempting such unbridled judicial discretion. A state court's eschewing statutory law and substituting judge-made law by reviving a civil statute of limitations and entering a "surcharge judgment" in a probate related matter is at tension with the most basic constitutional principles of embodied in the Due Process, Equal Protection, and Privilege and Immunities Clauses, as well as the prohibition against Excessive Fines. It also conflicts with the language and spirit of *Stogner v. California*, 539 U.S.__, 123 S.Ct.__, 156 L.Ed.2d 544 (2003). There is no logical reason for a state's probate related matters to evade the constitutional safeguards

provided by the Eighth and Fourteenth Amendments.

Second, the Florida Courts wholly disregarded the Due Process, Equal Protection, and Privileges and Immunities Clauses and the Eighth Amendment's prohibition against Excessive Fines. These clauses are explained in *BMW v. Gore,* 517 U.S. 559 (1996) and cases in its path, such as *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S.__ , 123 S.Ct.__, 155 L.Ed.2d 585 (2003), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). The Eighth Amendment's "proportionality principle" was wholly ignored and it was fundamentally unjust under the Fourteenth Amendment to award a "surcharge judgment" that was "grossly excessive". The state court made no effort to categorize trust administrative expenses into what it believed was proper and what it deemed improper, but instead took a broad brush approach and arrived at an enormous punishment equivalent to the amount of *all* trust administrative expenses over a 6 year period. Neither the trial court nor any appellate court ever identified or explained its analysis of the *BMW v. Gore* factors, despite Petitioner's repeated claims that the Due Process Clause was violated by the grossly excessive award. But for the multiple constitutional errors, the Florida courts could not have legitimately imposed any "surcharge" at all.

**I. The State Court Decisions Below Establish An Intolerable Precedent in the Balance of Powers, Meriting This Court's Judicial Scrutiny Because They Conflict With This Court's Established Precedent And State Courts Must Follow the Rule of Law and the Constitution In Probate Related Matters To Prevent Nationwide Harm**

Disputed testamentary trust matters rarely involve federal oversight. The Tenth Amendment leaves local probate matters to the States for the most part, and the "probate exception" to federal diversity jurisdiction means

that such disputes typically escape federal review of any sort. Yet, through Amend. XIV, §1, States are compelled to ensure that their courts are following the rule of law and the Constitution. All State judgments may be reviewed in this Court for compliance. Petitioner requests such a review here because of the enormity of the adverse judgment and the lack of a constitutionally required appellate review by the State.

Although Miami-Dade County has only four judges assigned to handle probate related matters, those decisions can effect the entire country - as in the case of a recent dispute about the intended disposition of a decedent's bequest of monies for President Richard Nixon's Library.

It follows, then, that this High Court has both the jurisdiction and the obligation to scrutinize probate related decisions where this Court's interpretative precedents of fundamental constitutional principles have been ignored.

The constitutional transgressions here should not go unchecked. Every American has a right to expect adherence to the Bill of Rights in a state court system that administers will and trusts relating thereto. Where a state court ignores the law of the land announced in *BMW v. Gore*, 517 U.S. 559 (1996), this Court has not hesitated to impose it by reversal. See *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. __(2003) (holding that a Utah punitive damage award of $145M was excessive and violated Due Process Clause of Amend. XIV where full compensatory damages amounted only to $1M).

## II. The Judicial Extension of a Civil Limitations Period Here Is Fundamentally Unfair, Just As The Legislative Extension of the Criminal Limitations Period Was Unfair in *Stogner v. California*

There is no justification for permitting a State court to retroactively extend a State Legislature's civil limitations period. It logically follows that if a State's Legislature may not do so, then the same constitutional principles would

operate to preclude a State's judiciary from doing so through judge-made law under the guise of magic secretive equitable powers that serve no purpose in modern jurisprudence.

Judge Learned Hand wrote that extending a limitations period after the State has assured "a man that he has become safe from its pursuit ... seems to most of us unfair and dishonest." *Falter v. United States*, 23 F.2d 420, 426 (2d Cir.), cert. denied, 277 U.S. 590 (1928). In such a case, the government has refused "to play by its own rules," *Carmell v. Texas*, 529 U.S. 513, 533 (2000). It has deprived the defendant of the "fair warning," *Weaver v. Graham*, 450 U.S. 24, 28 (1981), that might have led him to preserve exculpatory evidence. F. Wharton, Criminal Pleading and Practice §316, p. 210 (8th ed. 1880) ("The statute [of limitations] is ... an amnesty declaring that after a certain time ... the offender shall be at liberty to return to his country ... and ... may cease to preserve the proof of his innocense"). And a Constitution that permits such an extension, by allowing legislatures to pick and choose when to act retroactively, risks both "arbitrary and potentially vindictive legislation," and erosion of the separation of powers, *Weaver, supra*, at 29, and n.10. See *Fletcher v. Peck*, 6 Cranch 87, 137-138 (1810) (viewing the *Ex Post Facto* Clause as a protection against "violent acts which might grow out of feelings of the moment"). *Stogner v. California*, 539 U.S. ___ (2003).

Moreover, the law is well established by now that these same principles of unfairness exist where expired civil limitations periods are extended. *Chase Securities Corp. v. Donaldson*, 325 U.S.304, 312 n.8 and 315-316 (1945) acknowledged that an extension of even an expired *civil* limitations period can unconstitutionally infringe upon a "vested right"). *William Danzer & Co. v. Gulf & Shrimp Island R. Co.*, 268 U.S. 633, 637 (1925) held the same. See *Stogner v. California*, 539 U.S. ___ (2003).

In this case, Respondent BERKETT did not

commence her action against Petitioner WEISS until over a year after the civil statute of limitations of 6 months had expired. This could not possibly be what the State Legislature intended. All three branches of a State government must follow the same constitutional imperative set forth in Amend. XIV, § 1, which imposed the Due Process Clause upon all branches of a State government.

Here, the State Courts substituted a "surcharge judgment" for the rule of law and thus overrode a promulgated law that established a 6 month statute of limitations for bringing any challenge to a trustee's accounting or conduct. The State Courts injected judicial principles to extend civil limitations and such arbitrary extensions were preempted by the rule of law. Fla. Stat. §737.307 established a 6 month period calculated from a trustee's *delivery* and *the beneficiary's receipt* of documents, not from a beneficiary's *delayed discovery* of what each delivered documents said. Belated or delayed discovery cannot provide a magical extension of a complete affirmative defense where, as here, there was no finding that any delay was attributable to Petitioner's own conduct. Judges deciding probate related matters are also required to follow the rule of law and are not constitutionally permitted to render spontaneous gut decisions about a catch-all "surcharge judgment" by applying general notions of judicial discretion and equity where fundamental fairness decrees that the deadline for suit has long since passed.

Furthermore, there will always be "miscarriages of justice" whenever such civil limitations periods are retroactively extended, whether it be legislatively or judicially. The basic protection against "judgments without notice" afforded by the Due Process Clause, *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Stevens, J., concurring in judgment) is implicated in civil *penalties*. Here, the non-resident Petitioner was haled into a Florida court by a civil summons in 1991 to answer claims for which the legislated

statute of limitations had already expired in 1990.

Finally, Petitioner was summoned into a Florida court over a year after she would have had any reason to preserve any proof regarding the issues here. As the Third District Court found in June 2001, Petitioner had not had access to the trust records and accountings in over a decade since Petitioner delivered them to Respondent in January 1990. Without no advance access to such documents it was not possible to meaningfully cross-examine Respondent's CPA.

## III. The Arbitrary and Grossly Excessive "Surcharge Judgment" of $ 1,693,181.73 Violates Both the Due Process Clause and the Excessive Fines Clause, and Wholly Disregards *BMW v. Gore*'s Limitations and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*'s Judicial Review Analysis

Black's Law Dictionary, 4th ed. defines a "surcharge" as "[a]n overcharge; an exaction, impost, or incumbrance beyond what is just and right, or beyond one's authority or power." Black's Law Dictionary, 7th ed. (1999) defines a "surcharge" (noun) as "1. An additional tax, charge, or cost, usu. One that is excessive...5. the amount that a court may charge a fiduciary that had breached its duty" and (verb) "3. (Of a court) to impose a fine on a fiduciary for breach of duty." On its face, a "surcharge judgment" is thus an excessive penalty so logically it must be fully scrutinized under constitutional guidelines.

In 1996, this Court announced its holding in *BMW v. Gore*, which helped to illuminate the character of the standard that will identify constitutionally excessive awards of punitive damages. In announcing that the award in that Alabama case was "grossly excessive" and transcended "constitutional limits", this Court explained that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to

punishment but also of the severity of the penalty that a State may impose."

Only when an award can fairly be characterized as "grossly excessive" in relation to the State's interests in vindicating the State's legitimate interest in punishment and deterrent does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. *Gore* set forth a three prong test to analyze, *inter alia*, the mathematical ratio between the compensatory damages and the punitive damages, using certain factors including the relationship between the penalty and the harm caused. Excluded from any legitimate analysis is conduct occurring outside the State because the State has no real interest in that. In addition, there must be some genuine causal connection shown between the conduct and the harm.

In a more recent case, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L. Ed.2d 674 (2001), this Court reviewed the applicable analysis for the reviewing court and vacated and remanded a 9th Circuit case. In *Cooper*, there had been a $50,000 compensatory damages award and a $4.5 million punitive damages award that the appellate court had not reduced. This Court held that a *de novo* standard applies when reviewing the district court determinations of the constitutionality of punitive damages awards, noting that if appellate courts are to maintain control of, and clarify, legal principles, then the awards must be reviewed by a more careful standard than merely for abuse of discretion. It noted that the answer to the constitutional question may also likely depend on the standard of review, which should be *de novo*.

*Cooper* reiterated that the Fourteenth Amendment's Due Process Clause imposes substantive limits on the State's discretion, making the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States, *Furman v. Georgia*, 408 U.S. 238, and prohibiting States from imposing "grossly excessive"

punishments on tortfeasors.

In holding that a *de novo* review is the constitutional standard, the *Cooper* decision compared it to the trial judges' reasonable suspicion and probable cause determinations which are reviewed *de novo*, because they are fluid concepts that take their substantive content from the particular contexts in which the standards are being expressed and that because such concepts acquire content only through case-by-case application, independent *de novo* review tends to unify precedent and stabilize the law equally applicable when passing on district court determinations of the constitutionality of punitive damages.

The "surcharge judgment" here is a compilation of all checks written by Petitioner from Fall 1984 to December 1989, all checks written by her predecessor institutional trustee who served alone, and a separate category for monies allegedly personally expended by Respondent, without any corresponding nexus. Respondent's expert CPA witness testified that he was asked to compile totals but had no idea what legal matters any of the paid legal bills pertained to and could not say whether the paid invoices pertained to real estate closings, to defending litigation against the trusts, or to litigation initiated by Petitioner as trustee. (T.T. 10/15/01 @34-35). He stated that the Petitioner's accounting records were "adequate" and "in order" (T.T.9/21/00@73). He said that he "was only asked to testify as to the totals of expenses per the accounting records". (T.T. 10/15/01@34-35).

Under Fla. Stat. §737.402(2)(y)and (z), a trustee may retain and pay lawyers and accountants without judicial pre-approval. The "surcharge judgment" is "grossly excessive" under the Due Process Clause because it patently fails to differentiate between what should be deemed "punitive" and what should be considered "compensatory". The "surcharge judgment" is tantamount to a private fine against Petitioner in the amount of ***all*** of the checks written from the trust accounts, although it is logical to assume that during over

five years of her trusteeship (and during the predecessor institutional fiduciary's trusteeship) there were necessary administrative expenses for taxes, accountants, and lawyers.

By making a global "surcharge judgment" based upon her own determination that such an enormous punishment was appropriate without ever isolating even a single legitimate trust expense in over six years, the trial judge failed to follow the principles announced in *BMW v. Gore*. Thus, the "proportionality requirement" is not demonstrated by the Florida "surcharge judgment" that is entirely punitive.

The "surcharge judgment" was a prohibited Excessive Fine because, *inter alia*, it required Petitioner to forfeit all trustee fees she had earned over a five year period, although the annual accountings reported such amounts to Respondent, and Respondent made no court challenges during the various 6 month periods following each such annual reporting, which includes trustees fees.

"The Excessive Fines Clause limits the government's power to extract payments [and civil forfeiture] is a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional fine." *Austin v. United States*, 509 U.S. 602, 609 (1993). (See also *Hudson v. United States*, 522 U.S. 93, 102-3 (1997) which points the way to both a Due Process and Excessive Fines analysis for multiple civil penalties which do not offend the Double Jeopardy Clause.)

In between the time of entry of the "surcharge judgment" and the affirming opinion by the Third District Court , the Third District Court entered a separate order granting Petitioner's petition for a writ of prohibition (on grounds of conduct and statements showing prejudice and bias) that prohibited that same trial judge from presiding any further in the case. *Weiss v. Berkett*, 827 So. 2d 383 (Fla. 3d 2002). Under Fla. Judicial Administrative Rule 2.160(h) all prior orders of a disqualified judge would be subject to review by a successor judge under a *de novo* standard of review, however Petitioner could not timely invoke that

secondary review when that decision was entered because under Florida appellate rules, the appellate court still had exclusive jurisdiction during its review period. Notwithstanding the appellate order that essentially disqualified the trial judge who had steadfastly refused to timely relinquish the case, the Third District Court entered its scant opinion, affirming the enormous "surcharge", with only a slight downward modification for adjustment on remand, without showing any independent *de novo* analysis.

The Third District Court's opinion states that it merely utilized a "no reversible error" standard, the one that it typically applies in civil cases where constitutional issues are not present and *de novo* review is not compelled. The problems associated with this constitutionally inadequate standard are more fully explained in Point IV below.

However, Petitioner reiterates that the $ 1,693,181.73 (now $1,676,377.73) "surcharge judgment" is arbitrary and "grossly excessive" and repugnant to both the Due Process Clause and the Excessive Fines Clauses. It is also completely antithetical to the carefully crafted holdings of *BMW v. Gore* and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, which the Florida Courts wholly ignored.

## IV. The Florida Courts' Limited Review Conflicts With This Court's Relevant Decisions About the Scope and Clarity of a State's Judicial Review to Ensure A State's Compliance with the Fourteenth and Eighth Amendments

As explained in greater detail in Point III, a "surcharge" is by definition an "overcharge" and "fine" and so *BMW v. Gore* required an appellate review to determine whether the $1,693,181.73 "surcharge judgment" was "grossly excessive" in a constitutional sense. Because the bench order lumped together all payments for all trust expenses during two separate trusteeships over 6 years, the "surcharge judgment" was unquestionably "grossly

excessive' in a constitutional sense because it was tantamount to a punishment and private fine that bore no relationship to any legally cognizable claim.

Respondent's argument – that all trust administrative expenses during two separate trusteeships should be "surcharged" against Petitioner – was wholly accepted at a bench trial by a judge who was later reversed on an earlier "accounting claim" and then ultimately disqualified by an appellate panel by a petition on grounds of prejudicial bias. Under these circumstances, there is no logical reason to defer to the discretion of the trial judge. Furthermore, this was not a jury case that compels any deference to a jury verdict.

Surely, a Florida appellate court was required to scrutinize the record *de novo* under *Cooper Industries* in order to identify the *BMW* factors when Petitioner raised the issues that the trial court had ignored Fla. Stat.§737.307's 6 month limitations period and entered a grossly excessive award that was not supported by any supporting evidence other than pure inadmissible hearsay. Nothing in the record of any Florida court indicates that it analytically justified such an enormous punitive award by specifically evaluating it against the *BMW* three-prong test.

More importantly, the required *de novo* review must determine whether there was any "rational possibility" that those constitutional errors might have contributed to an adverse bench verdict.

Rather, Florida's appellate court opinion indicates that it only determined that there had been no "no reversible error", which means it reviewed by using only Florida's harmless error rule applied to civil cases, Fla. Stat. § 59.041 (a-12) which fails to distinguish between constitutional errors and non-constitutional errors in civil cases.

According to [ Florida appellate judge] Philip J. Padovano, Florida Appellate Practice, 2003 ed., §9.8 "[t]he harmless error statute that applies in civil cases is section 59.041, Florida Statutes." Florida's "test for determining the

existence of reversible error in a civil case is whether there is a reasonable probability that a result more favorable to the party seeking review would have been reached if the error had not been permitted." Id. at 146-7. *See National Union Fire Ins. v. Blackmon*, 754 So. 2d 84 (Fla. DCA 2000) (collecting cases) which discusses Florida's civil harmless error standard recited in Fla. Stat.§59.041 which places upon appellant the burden of proof that a different result would have been reached, with Florida's criminal harmless error rule codified in Fla. Stat. §924.33, discussed in detail in *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986) (in criminal proceedings, "[t]he harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.") *State v. DiGuilio* adopted the harmless error test for criminal cases, following this Court's opinion in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 24, 17 L. Ed2d 705 (1967) to ensure Florida's enforcement of constitutional protections. That same reasoning should have been applied to civil cases that raise constitutional issues, as this one does.

Thus, it is apparent that Florida's Third District Court of Appeal did not use the correct law on review of what it readily identified as a "surcharge judgment". More specifically, where an appellant claims that there were constitutional errors that resulted in a grossly excessive award (as Petitioner claims here), reversal is required unless there is no reasonable "possibility" that the error "might" have contributed to the adverse judgment. Here, neither the trial court nor the appellate court set forth any ratio of amounts that would traditionally be called "compensatory" and "punitive" but rather accepted a global sum as purely "punitive" without any linkage to any actual "harm" that truly occurred because of a perceived "conflict of interest" in Petitioner's payment of trust administrative expenses for

federal taxes, accountings, real estate closings, and the like. There was no judicial explanation at any level as to why Petitioner should be accountable and "surcharged" for the 1983-1984 administrative expenses of the prior trustee, Coconut Grove Bank and why "surcharges" in those amounts would not be wildly excessive in a constitutional sense.

Instead, despite this Court's holdings in *BMW v. Gore* and *Cooper Industries, Inc.*, the Florida courts failed to perform a *de novo* review of each portion of the "surcharge judgment" against the *BMW* factors. Had it done so, it would have readily been apparent that there was a possibility that no portion of the "surcharge judgment" should have been affirmed because of the constitutional deficiencies in light of the lack of any nexus between expenses paid and the belatedly claimed harm to the trusts and to Respondent.

Justice Ginsburg's dissenting opinion in *BMW v. Gore* contains a footnote surveying the various limitations that various state legislatures have imposed upon punitive damages. It notes that Florida has a 3:1 ratio cap on such punitive damages. However, without any constitutionally guided appellate review and without clear guidelines for the state judiciary to follow, there can be no meaningful Due Process to implement such statutory limitations, whether they be the 3:1 ratio cap or the complete affirmative defense that any claim for a "surcharge" was time barred under Fla. Stat.§737.307.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Patricia Pollak Weiss
*Attorney for Petitioner*
Post Office Box 751
Sag Harbor Shopping Cove Suite #12
Sag Harbor, New York 11963
(631) 725-4486

October 9, 2003

# APPENDICES

**ORDER GRANTING MOTION FOR SURCHARGE AGAINST PATRICIA POLLAK WEISS dated February 8, 2002**

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
PROBATE DIVISION
FILE NO. 92-4412(Div.03)

**In Re: The Trusts under the Will of Albert Pollak**

**PHYLLIS POLLAK BERKETT,**
**As the Successor Interim Trustee of the**
**Trusts Under the Will of Albert Pollak, Deceased,**
**and the Albert Pollak Inter Vivos Trusts**
**Plaintiff/Counter Defendant**

**vs.**

**PATRICIA POLLAK WEISS,**
**Defendant/CounterPlaintiff.**

_____/

## ORDER GRANTING MOTION FOR SURCHARGE AGAINST PATRICIA POLLAK WEISS

THIS CAUSE came on for hearing on September 20, 2000 and October 15, 2001 on Phyllis Pollak Berkett's Amended Complaint (Petition) for Statements of Accounts and for Surcharge against Patricia Pollak Weiss, filed by Petitioner Phyllis Pollak Berkett, and the Court having reviewed and evaluated the evidence and testimony presented, having considered the arguments of counsel, as well as the applicable case law, and being otherwise fully

advised in the premises, find and concludes as follows:

1. That a conflict of interest existed between Patricia Pollak Weiss individually and Patricia Pollak Weiss as Trustee of both the Albert Pollak Testamentary Trust and the Albert Pollak Inter Vivos Trust.

2. That in light of Patricia Pollak Weiss' conflict between her individual and fiduciary position as Trustee, any and all payments of trustee and/or attorneys fees sought on her behalf should have been by applications to the probate court (see: Shriner v. Dyer, 462 So. 2d 1122 (4th DCA 1984).

3. The preponderance of the evidence presented established that the trusts in question were substantially depleted of assets as a direct and proximate cause result of the improper actions taken by Patricia Pollak Weiss, as Trustee, including but not limited to, the continuation of litigation involving the estate and the trusts and the payment of fees and expenses relative to said litigation

WHEREFORE, it is herein ORDERED and ADJUDGED as follows:

1. The Amended Complaint (Petition) for Statements of Accounts and for Surcharge against Patricia Pollak Weiss is GRANTED with judgment to be entered against said Patricia Pollak Weiss in the sum of $1,693,181.73.[1]

A. The above surcharged amount is made up of the following component assessments:

1. Trustee fees incurred for the time period of June 1, 1983 through December 30, 1989 while Patricia Pollak Weiss served as Trustee, in the amount of $91,604.33;

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1.The actual amount announced by the Court, according to the transcript of the October 15, 2001 evidentiary hearing, is $1,693,981.73, which amount is believed to have been due to either a scrivner's error or a mathematical error.

2. Legal fees incurred on behalf of the trusts for the time period of June 1, 1983 through October 1, 2001, in the amount of $257,435.01, which fees were incurred as a direct and proximate result of the litigation engendered by Patricia Pollak Weiss as Trustee;

3. Legal fees paid by Phyllis Berkett individually on behalf of the trusts as a result of the litigation engendered by Patricia Pollak Weiss for the time period of June 1, 1983 through December 30, 1989, in the amount of $219,248.02;

4. Additional expenses incurred on behalf of and paid for from the trusts and associated with the resolution of the litigations engendered by Patricia Pollak Weiss, in the amount of $516,272.37;

5. Expenses advanced by Phyllis Berkett on behalf of the trusts associated with the resolution of the litigation engendered by Patricia Pollak Weiss, in the amount of $595,000.00; and

6. Accounting fees paid by or on behalf of the trusts incurred as a direct and proximate result of the litigation engendered by Patricia Pollak Weiss, or the resolution thereof, in the amount of $13,622.00.

**For which sums let execution issue.**

2. The Court further reserves jurisdiction to carry out any and all orders of this Court.

**DONE and ENTERED** in chambers at Miami-Dade County, Florida this 8th day of Feb., 2002.

/s/ Circuit Court Judge

Judge Maria M. Korvick

copies to:
Joel Hirschhorn, Esq.
Patricia Pollak Weiss, Esq.
Jonathan Oster, Esq.
Edward I. Golden, Esq.

**OPINION AND ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL dated and filed November 6, 2002**

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2002

PATRICIA POLLAK WEISS, **

Appellant, ** CASE NO. 3D0-609

vs.

PHYLLIS POLLAK BERKETT, etc. ** Lower Tribunal

Appellee, ** Case Nos. 91-5143
92-4412

Opinion filed November 6, 2002

An appeal from the Circuit Court of Miami-Dade County, Maria M. Korvick, Judge

Patricia Pollak Weiss, in proper person

Hirschhorn & Bieber and Joel Hirschhorn, for appellee

Before FLETCHER and RAMIREZ, J.J., and NESBITT, Senior Judge

PER CURIAM.

Patricia Pollack Weiss appeals a surcharge judgment entered in connection with her trusteeship over several testamentary trusts. After a thorough review of the record and the applicable law, we find no reversible error in the proceedings below. We do, however, accepts appellee's concession of error with regard to the computation of the amount surcharged and remand for the sole purpose of correcting the judgment to reflect the amount of the surcharge as $1,676,377.73. In all other respects, the judgment is affirmed.

**ORDER OF THE SUPREME COURT OF FLORIDA**
**dated and filed July 11, 2003**

SUPREME COURT OF THE STATE OF FLORIDA

CASE No. SC03-377

Lower Tribunal No. 3D02-609

PATRICIA POLLAK WEISS, Petitioner(s)

vs.

PHYLLIS POLLAK BERKETT, etc., Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

WELLS, PARIENTE, LEWIS, QUINCE and CANTERO, JJ., concur.

A True Copy

Test:

/s/

Thomas D. Hall

Clerk, Supreme Court

**ORDER OF THE SUPREME COURT OF FLORIDA**
**dated and filed March 14, 2003**

SUPREME COURT OF FLORIDA

CASE No SC03-377

Lower Tribunal No. 3D02-609

PATRICIA POLLAK WEISS, Petitioner(s)

vs.

PHYLLIS POLLAK BERKETT, etc., Respondent(s)

The petition for writ of prohibition which this Court has treated as a motion to stay pending review, is hereby denied. See Fla. R. App. P. 9.310(A)-(B).

A True Copy Test:/s/ Thomas D. Hall, Clerk, Supreme Court

**ORDER OF THE SUPREME COURT OF FLORIDA**
**dated and filed June 11, 2003**

SUPREME COURT OF FLORIDA

CASE No. SC03-377

Lower Tribunal No. 3D02-609

PATRICIA POLLAK WEISS

vs.

PHYLLIS POLLAK BERKETT, etc.

Petitioner's "Motion for an Order that Relinquishes the Supreme Court of Florida's "Exclusive" Jurisdiction for the "Limited Purpose" of Permitting the Lower Tribunal's Successor Judge to Entertain and Determine Petitioner's Pending Judicial Administration Rule 2.160(h) Motion For Reconsideration and Petitioner's Anticipated Fla. R. Civ.P. 1.540 Motion for Relief from Judgment" is hereby denied as it is not required.The circuit court has jurisdiction to proceed.

A True Copy Test:/s/ Thomas D. Hall, Clerk, Supreme Court

**WEISS v. BERKETT, 827 So. 2d 383 (Fla. 3d DCA 2002)**
**dated and filed October 9, 2002**

**Patricia Pollak WEISS, Petitioner**

**v.**

**PHYLLIS POLLAK BERKETT,**
**As the Successor Interim Trustee of the**
**Trusts Under the Will of Albert Pollak, Deceased,**
**and the Albert Pollak Inter Vivos Trusts, Respondent**

**No. 3D02-1806**

**District Court of Appeal of Florida,**

**Third District**

**October 9, 2002**

A Writ of Prohibition to the Circuit Court for Miami-Dade County, Maria M. Korvick, Judge

Patricia Pollak Weiss, in proper person

Hirschhorn & Bieber and Joel Hisrchhorn, Coral Gables' Jacobs Chase Frick & Kelley and Jonathan C. Oster; and Susan E. Durre', South Miami, for respondent.

Linda Kelly Kearson, general Counsel, 11th Judicial Circuit of Florida, for Maria M. Korvick, Judge.

Before GERSTEN, FLETCHER and SHEVIN, J.J.

PER CURIAM.

We grant the petition for writ of prohibition. Here, as we found in *Pollak v. Berkett*, 816 So. 2d 1142 (Fla. 3d DCA 2002), the disqualification motion should have been granted. We are confident that issuance of the writ will be unnecessary.

Prohibition granted.

**WEISS v. BERKETT, 785 So.2d 1248(Fla. 3d DCA 2001)**

**dated and filed June 6, 2001**

**Patricia Pollak WEISS, Appellant**

**v.**

**Phyllis Pollak BERKETT, et al., Appellees**

**No. 3D00-3066**

**District Court of Appeal of Florida,**

**Third District**

**June 6, 2001**

Appeal from the Circuit Court for Miami-Dade County, Maria M. Korvick, Judge

Patricia Pollak Weiss (New York), in proper person

Hirschhorn & Bieber, P.A., and Joel Hirschhorn and Brian H. Bieber, Coral Gables, for appellees.

Before SCHWARTZ, C.J.,and JORGENSON and COPE, J.J.

PER CURIAM.

Patricia Pollack Weiss, the defendant below, appeals from an order requiring her to provide a detailed trust accounting for the year 1989. For the following reasons, we quash the order under review.

After Berkett, the plaintiff below, filed suit for discharge of Weiss, the defendant below, as trustee of several testamentary trusts, Weiss and Berkett entered into a settlement agreement. Under this 1989 open-court settlement agreement, Berkett was to assume the trusteeship immediately. Weiss was to transfer all the trust records within her possession to Berkett within ten days and to send releases to any attorneys or accountants with trust records,

putting them on notice that Weiss relinquished the right to access any documents. Weiss complied by transferring all the records to Berkett and sending the releases.

In 1991, Berkett filed suit against Weiss for, among other things, an accounting. After a trial, the court entered an order requiring Weiss to prepare a detailed accounting. This appeal follows.

We reverse because Berkett waived any right to an accounting in 1989. *See* Fla. Stat. 737.303(4)(d). The transcript of the 1989 settlement hearing, signed by both parties, shows that Berkett chose to take immediate possession of the documents rather than have Weiss prepare an accounting. At that time, Berkett clearly did not expect Weiss to perform an accounting, as the agreement required Weiss to transfer every scrap of paper within 10 days (although Berkett said she wanted the records sooner), rendering it impossible for Weiss to perform an accounting.

Even if Berkett had not effectively waved any right to an accounting, the order must be quashed because Berkett has already had her own accountant perform an accounting for the year 1989. To require Weiss to perform an accounting is, therefore, redundant, superfluous, and futile. *See, e.g. Plaza v. State*, 699 So. 2d 289 (Fla. 3d DCA 1997). In addition, because Weiss does not have possession of the records which she would need to perform an accounting, the lower court erroneously ordered Weiss to perform an impossible act. *See U-M Publishing, Inc. V. Home News Publishing Co.,* 279 So.2d 379 (Fla. 3d DCA 1973) (holding that the trial court erred in ordering defendant to do an impossible act).

The order under review is quashed and the cause is remanded for further proceedings not inconsistent with this opinion."

**ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL dated and filed January 31, 2003**

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2002

JANUARY 31, 2003

PATRICIA POLLAK WEISS, **

Appellant(s)/,Petitioner(s) ** CASE NO. 3D0-609

vs.

PHYLLIS POLLAK BERKETT, etc. ** Lower Tribunal

Appellee(s)/Respondent(s), ** Case Nos. 91-5143
92-4412

Upon consideration, appellee's motion for leave to file appellee's response to appellant's motion for rehearing and motion for rehearing en banc and motion for certification out of time is hereby denied.

Upon consideration, appellant's January 3, 2003 motion to supplement is hereby denied.

Upon consideration, appellant's motion for rehearing and motion for certification are hereby denied. FLETCHER and RAMIREZ, J.J., and NESBITT, Senior Judge, concur. Appellant's motion for rehearing is denied en banc.

**Amendment VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Amendment XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Florida Statute §737.307 Limitations on proceedings against trustees after beneficiary receives account.**

"Unless previously barred by adjudication, consent, or limitations, an action against a trustee for breach of trust is barred for any beneficiary who has received a final, annual, or periodic account or other statement fully disclosing the matter unless a proceeding to assert the claim is commenced within 6 months after receipt of the final, annual, or periodic account or statement. In any event, and notwithstanding lack of full disclosure, all claims against a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination are barred as provided in chapter 95.11. A beneficiary has received a final, annual, or periodic account or statement if, being an adult, it is received by the beneficiary or if, being a minor, disabled person, or person who may take by virtue of the exercise or nonexercise of a power of appointment, it is received by the beneficiary's representative as described in §731.303."

**"Florida Statute 737.402 Powers of trustees conferred by this part.--**

(1) From the creation of the trust until final distribution of the assets from the trust, a trustee has the power to perform every act that a prudent trustee would perform for the purposes of the trust, without court authorization, including, but not limited to, the powers specified in subsections (2)...

.....

(2) ....

(y) To employ persons, including attorneys, auditors, investment advisers, or agents, even if they are the trustee or associated with the trustee, to advise or assist the trustee in the performance of his or her administrative duties; to act without independent investigation upon their recommendations; and, instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

(z) To prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his or her duties

....."

**"Florida Statute 59.041 Harmless error; effect**
No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed."